No. 2428

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANDREW CLAUSS, VICTOR ENGINGER, W. A. GRUBB, JOSEPH HAMM, K. HALTER, L. SCHOTT, L. LAIT, E. W. CLARK, JEAN A. GOURSELLE, M. C. BROOKE, H. L. BROOKE, JESSE W. OLNEY, LILLY M. STEWART, THEODORE B. WILCOX, F. L. SHULL and ALVIN J. WHITMAN,

Appellants,

vs.

PALMER UNION OIL COMPANY (a corporation), FRANK L. BROWN, LEWIS A. HILBORN, GEORGE L. WALKER, CHARLES E. LADD, GAVIN MCNAB, H. C. STRATTON, and GEORGE I. STEWART, as directors of said Palmer Union Oil Company (a corporation), and in their respective and individual capacities, FRANK L. BROWN, J. C. KEMP VAN EE, LEWIS A. HILBORN, H. C. STRATTON and CHARLES E. LADD, as directors of Palmer Oil Company (a corporation), and in their respective and individual capacities, ANGLO-CALIFORNIA TRUST COMPANY (a corporation), and PALMER OIL COMPANY (a corporation),

Appellees.

Upon Appeal From the United States District Court for the Northern District of California, Second Division.

Honorable M. T. DOOLING, Judge.

BRIEF FOR APPELLANTS.

JOHN E. BENNETT,
JESSE OLNEY,
Solicitors and Counsel for Appellants.

PERNAU PUBLISHING COMPANY

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BRIEF FOR APPELLANTS.

Abstract and Statement of the Case.

The gist of this action is to set aside on the ground of fraud and conspiracy against the minority stockholders upon the part of the directors of the two defendant corporations, the transfer and *sale* by them of the *assets* of the Palmer Oil Company to their Palmer Union Oil Company for their own individual benefit and without valuable consideration to the said minority shares, which to date have received nothing whatever for a very valuable property.

The bill of complaint sets forth in detail the formation by the defendants of their Palmer Union Oil Company as a California corporation with the design of securing to it

> "for their own benefit all of the property of the Palmer Oil Company and its minority holdings of stock without giving or paying anything of substantial value therefor, and thereby to deprive and defraud the Palmer Oil Company, and its minority stockholders, of all interest in that corporation" (Bill, par. II, Trans. p. 6).

The bill then proceeds to show of what the Palmer Union Oil Company so organized consisted and that its assets were of comparatively little or no value, and that these defendants who composed its entire directorate were owners of practically the entire number of shares of stock issued. That this com-

pany was capitalized at *$6,000,000 (later increased to $10,000,000)*, but possessed assets of only $140,000 in value at the outside, these assets consisting of wildcat lands, and that the company had no income (Bill, pars. II, III, IV, Trans. pp. 6-11).

That with this slender substance the conspiracy was formed by these defendant directors to obtain for themselves in this their Palmer Union Oil Company, the assets of Palmer Oil Company, of which they likewise composed the entire directorate and controlled a majority of the stock, and whose assets were of the value of $2,500,000 (Bill, par. I, Trans. p. 3).

That in pursuance of this fraudulent conspiracy these defendant directors, in behalf of their Palmer Union Oil Company, entered into negotiations with themselves as directors of Palmer Oil Company for the *sale* to their Palmer Union Oil Company possessing merely nominal assets, of the assets of the Palmer Oil Company, which assets were of a value of $2,500,000, for $2,000,000 in bonds of the Palmer Union and $2,000,000 in its common stock, under the direct misrepresentation made to the stockholders of Palmer Oil Company that said purchase price was to be at once distributed to the minority shares pro rata (Bill, par. V, Trans. pp. 13-17).

That in addition to the assents to this sale by the stock controlled by these defendant directors themselves they obtained by false and fraudulent representations to the minority shareholders of the

Palmer Oil Company enough further assents to make two-thirds, or which they claimed to be two-thirds, of such issued stock (Bill, par. V, pp. 13, 14, 15, 16, 17; par. VI, p. 18). That thereupon the total assets of the Palmer Oil Company passed into the possession of the Palmer Union Oil Company and of these defendants. That said transfer was an outrage and imposition upon the interests of the minority stockholders of the Palmer Oil Company, and was made in fraud of such stockholders and their proportional interest therein. That said transfer and sale was of great benefit to these defendants and their Palmer Union Oil Company, but was destructive of the interests of the stockholders of the Palmer Oil Company (Bill, par. VII, Trans. pp. 18, 19).

That thereafter the said purchase price, consisting of the said Palmer Union bonds and stock, were transferred by these defendant directors of the one corporation to themselves as directors of the other corporation, *but never distributed to the minority shares.* That later on these defendant directors, as virtual owners and in control of the Palmer Union Oil Company, caused its capital to be increased to $10,000,000 (Bill, par. VIII, Trans. pp. 20-24), later designating $4,000,000 of this as preferred shares.

That thereupon these defendant directors, through the fraudulent voting of certificates of stock of the Palmer Oil Company fraudulently obtained by them, and without the knowledge and without notice to the minority shareholders, caused a meeting to be

held of Palmer Oil Company and authorized themselves as its directors to take out of the treasury of the Palmer Oil Company (the seller) and to return to themselves as directors of their Palmer Union Oil Company (the buyer) the said $2,000,000 in bonds (the purchase price), and actually did so denude the Palmer Oil Company treasury in fraud of its minority shares of these bonds which had now become the only asset of the company. That thereafter these bonds were cancelled by these directors for and on behalf of the Palmer Union Oil Company; by which transaction these defendants had obtained for their interests in the Palmer Union Oil Company and for their company the entire assets of the Palmer Oil Company, *for nothing*.

That this result was obtained by the pretended exchange between these defendants acting as the directors of both corporations of these 6% first mortgage gold bonds of the Palmer Union Oil Company in the Palmer Oil treasury for Palmer Union assessable preferred stock on a dollar for dollar basis.

> "That the transaction was a further fraud upon the said Palmer Oil Company, and a part and process of the scheme of said conspirators to contrive, by successive steps, to deprive said minority stockholders of all interest whatever in their Palmer Oil Company properties" (Bill, par. VIII, Trans. p. 23).

That in fact there was not even any transfer of preferred stock back to the Palmer Oil Company in exchange for those Palmer Union bonds, but that thereafter these defendants, as directors of Palmer

Union Oil Company, fraudulently caused requests to issue to the minority stockholders of the Palmer Oil Company to come to them and deliver up their Palmer Oil Company certificates of shares (which represented their rights to the bonds) and receive a share of Palmer Union preferred and one share of Palmer Union common (both assessable) stock therefor. These directors meanwhile and those they controlled had so exchanged all their own Palmer Oil Company shares into further Palmer Union Oil Company shares; thus by adding the one to the other obtaining the full and complete benefit to themselves as individuals of the fraud accomplished. That by this means they procured large quantities of Palmer Oil Company stock, enough to constitute two-thirds of the stock issued (Bill, par. IX, Trans. p. 24).

That thereupon, in an attempt to place the various frauds beyond attack, these confederates, without notice to the minority shares, disincorporated the Palmer Oil Company by causing, unknown to the minority, amended articles of incorporation to be filed with the Secretary of State of California reducing the term of its existence from 50 years to 6 years, 6 months and 4 days, whereby they sought to have the Palmer Oil Company expire by limitation within 6 days after the passage of their resolution, and within 2 days after its filing with the Secretary of State (Bill, par. IX, Trans. p. 25).

That the only name of a stockholder of Palmer Oil Company designated as voting was Palmer Union Oil Company as owning 1,341,106 shares, and

upon that vote alone the pretended amended articles were passed.

That the said stock so pretended to assent and vote upon the amendment of the articles of incorporation was not in fact, nor in law, nor in equity owned by the Palmer Union Oil Company either by proxy or otherwise, and had been fraudulently procured from the stockholders of the Palmer Oil Company (Bill, par. IX, Trans. p. 26).

That these defendants now claim the Palmer Oil Company, by reason of the fraudulent voting of its stock by the Palmer Union Oil Company, the party directly benefited, to be out of existence, and its total assets to be vested in themselves through their Palmer Union Oil Company.

That large numbers of Palmer Oil stockholders failed and refused to deliver up their original certificates of Palmer Oil Company stock to the Palmer Union Oil Company in exchange for its assessable shares. To force such to part with their certificates of Palmer Oil Company, and to compel them to become stockholders in Palmer Union, thus waiving all rights to obtain redress from the said fraudulent sale and transfer, these defendants, as directors of Palmer Union Oil Company, thereupon wrongfully and fraudulently arbitrarily placed the names of the non-assenting minority shareholders of the Palmer Oil Company who still retained their original stock certificates, upon the stock books of their Palmer Union Oil Company as holders of preferred

and common shares in said company, and then arbitrarily assessed these shares, threatening and notifying them that unless they delivered up their original Palmer Oil stock certificates and paid the assessment on the Palmer Union stock certificates so arbitrarily allotted to them upon the Palmer Union stock books that their stock would be sold as delinquent and they foreclosed of all right or interest in both corporations, upon the hypothesis that the Palmer Oil Company was now defunct and out of existence. That thereupon and in accordance with such fraudulent scheme the different amounts of stock so fraudulently and wrongfully arbitrarily placed upon the stock books of the Palmer Union Oil Company, as belonging to these non-assenting Palmer Oil Company minority shares, were declared delinquent (Bill, par. XII, Trans. p. 29), and sold out and taken over by the Palmer Union Oil Company, and its capitalization thereby so much reduced and the holdings of these defendant directors therein thereby so much enhanced. Whereby the majority and directors of the Palmer Oil Company thus obtained for nothing, to their own personal benefit, the property of the minority without consideration through a direct conspiracy to defraud.

The amended bill alleges that the complainant "was, and has been, and now is" the holder of his original certificate of shares of stock at all times mentioned in the bill since prior to the time of the fraudulent sale and transfer of assets which the bill attacks and never consented to any of the fraud-

ulent acts therein named; and it contains the various averments necessary under the new equity rules and practice.

The ultimate relief sought by the amended bill is that the transfer and sale by which the entire assets of the Palmer Oil Company were so conveyed to the Palmer Union Oil Company be declared null and void and of no effect, and that a decree be entered directing their return, and for general relief.

The original bill was filed October 7, 1913.

The defendants Palmer Union Oil Company and Lewis A. Hilborn thereupon filed answers to the merits without objecting to the jurisdiction of the Court over their persons, on October 28, 1913.

Motions to dismiss the original bill were later filed on behalf of the various defendants on November 8, 1913.

Complainant filed his amended bill November 15, 1913.

All the defendants thereupon filed motions to dismiss the amended bill on November 25, 1913.

An order was entered taking the amended bill pro confesso against Palmer Union Oil Company, and Lewis A. Hilborn, who had answered the original bill, and against Palmer Oil Company, which never at any time has appeared in the suit, and the other defendants, January 19, 1914.

The various defendants then, excepting Palmer Oil Company, filed motions to vacate the order tak-

ing the amended bill pro confesso, January 21, 1914.

Upon the hearing of these motions the Court vacated its order taking the amended bill pro confesso against all the defendants, and of its own motion against Palmer Oil Company, January 26, 1914.

Later the Court filed an opinion granting the motions of the various defendants to dismiss the amended bill, and an order was summarily entered thereon *"dismissing the suit"* March 2, 1914.

Thereupon a final decree was entered without notice to the complainant or his counsel of the Court's said order of March 2, 1914, dismissing the amended bill of complaint, March 4, 1914.

Thereupon complainant filed his motion asking leave of the Court to amend his bill to conform to the Court's opinion, March 10, 1914.

Thereupon the Court filed its opinion and entered its order denying complainant leave to amend April 3, 1914.

Specification of Errors Relied Upon.

First.

The Court erred in granting (Trans. p. 68) the motions of defendants Palmer Union Oil Company and Lewis A. Hilborn to vacate the order pro confesso taken against them; for the reason that they

had both answered to the merits the original bill on October 28, 1913, and thereafter complainant had filed an amended bill on November 15, 1913, and said defendants had not answered said amended bill within ten days, or at all, as required by New Equity Rule 32, and such order was properly entered.

The Court also, beyond this fact, erred as said defendants made no showing whatever of any kind to be relieved from said default. There was no showing, or evidence, or record before the Court save an affidavit of merits, separately filed, made by Gavin McNab (Trans. p. 67), one of the defendants, which, if of any value at all (which it was not), was of value as to himself alone, and could not be availed of by any other or others of said defendants.

It was error for the Court, arbitrarily and without a showing of any kind of mistake, inadvertence, surprise or excusable neglect, or otherwise, or proposed defense upon the merits, to relieve these defendants from the consequences of their own acts under the rule.

SECOND.

There was no motion made on behalf of Palmer Oil Company, defendant, to be relieved from said order pro confesso. It had not appeared in any manner in the suit; service had been regularly had upon it; the time had run against it; and the Court should not of its own motion have vacated the order pro confesso taken and entered against it, and the vacating of said order was error.

THIRD.

The Court erred in granting the motion of Palmer Union Oil Company and the several defendants to dismiss the amended bill of complaint, and in its opinion, order, and final decree thereon:

In its opinion (Trans. p. 69) granting the motion, the Court held that:

> "1. The Court has jurisdiction of the subject matter."
>
> "7. The facts set forth are sufficient to constitute a valid cause of action in equity."

But nevertheless held:

> "2. That the Palmer Senior Oil Company and the bondholders of the Palmer Union Oil Company are necessary parties";
>
> "5. That there is a misjoinder of causes of action in that the bill seeks to set aside a transfer, and seeks also to recover from the directors the value of the property transferred";
>
> "6. That there is a misjoinder of causes of action in that the bill seeks to set aside a transfer, and seeks also to recover the consideration for such transfer from the transferee";
>
> "8. That by reason of the non-joinder of necessary parties, and the misjoinder of causes of action the bill should be dismissed. The motion to dismiss is, therefore, granted."

The appellants cite said paragraphs 2, 5, 6 and 8 of the opinion as error, as they are the basis of the Court order of March 2, 1914, and the final decree of March 4, 1914, the making and entry of which the appellants also cite as error.

Taking up these paragraphs seriatim we cite each as error, as follows:

Paragraph "2". The Court holds the Palmer Senior Oil Company and the bondholders of the Palmer Union Oil Company to be *"necessary"* parties. It does not hold these to be *"indispensable"* parties. Accordingly the Court could have proceeded with the case and entered its decree without prejudice to the rights of these absent parties, or brought them in of its own motion. Their omission, therefore, could hardly be held sufficient to justify the dismissal without leave or opportunity to amend upon so slight a technical interpretation considering the very grave and detailed allegations of such a bill in equity.

Aside from the fact that the Palmer Senior Oil Company was defunct, a fact known to these defendants as they themselves had disincorporated it some years ago, its trustees, if really a "necessary" party, were before the Court in the persons of these defendants themselves; and the bondholders of Palmer Union Oil Company were represented in the suit by the defendant Anglo-California Trust Company, the trustee named in the bond issue. These facts were called to the attention of the Court in the argument of counsel upon the motion, and as permission was then asked that amendment be made if it should appear to the Court that any of the grounds of defendants' motion were well taken, a mere oral order from the bench would have been

sufficient to have extended to these parties already in Court the added capacities in which it would be disclosed they might properly be sued.

The errors of the remaining paragraphs of the opinion 5, 6, and 8 are caused by the Court's misinterpretation of the prayers for relief, treating the prayers as an integral part of the bill. Such prayers are purely a matter of form and could not even be reached by demurrer under the old practice nor motion under the new, and the defendants have nothing whatever to do with the form of the relief demanded. If the complainant was entitled to relief in any of the modes prayed for the motions of these defendants to dismiss could not be entertained. That the complainant was so entitled to relief is settled by the Court's own opinion itself in its paragraphs 1 and 7, holding that the Court had jurisdiction and that the bill stated a valid cause of action in equity.

FOURTH.

The Court erred in its order of March 2, 1914 (Trans. p. 71), entered upon the opinion, directing "That this *suit* be and the same is hereby dismissed".

It should have given complainant an opportunity to amend in accordance with its opinion, and if he did not do so *then,* that the suit be dismissed *without prejudice.*

FIFTH.

The Court erred in entering its final decree (Trans. p. 72) dismissing the bill two days later, on

March 4, 1914, without notice to the complainant or either of his counsel of the order of March 2, 1914.

SIXTH.

The Court erred in denying (Trans. p. 81) the motion interposed by the complainant to amend the said order of the Court of March 2, 1914, and to vacate and set aside said decree of March 4, 1914, and for leave to amend to conform to the Court's opinion; and that the Court erred in making and entering its order to that effect on April 3, 1914.

In this the Court erred as its denial to complainant of leave to amend was a clear abuse of discretion in an equity cause where the allegations were of so grave and minute a character as the case at bar, and which allegations, moreover, had been held to state a valid cause of action in equity by the Court's own opinion. The amendments proffered were simply the omitting of the prayers to which the Court took exception. They set forth no new cause of action, but instead simplified the issues in a large degree. The Court's entry of its order denying leave to amend was clearly error.

The Court erred in its opinion filed upon which (Trans. p. 79) the order was entered, in that it embraced the erroneous view that in a class suit, brought on behalf of the complainant and all other persons similarly situated, and for the use and benefit of the corporation, and where the Court had originally assumed jurisdiction and later by its

opinion held that it had jurisdiction, that the citizenship of subsequent intervenors ousted that jurisdiction. The citizenship of the parties thus brought in could not divest the Court of jurisdiction in the main suit, and the Court's opinion to the contrary and its order thereon was error.

ARGUMENT.

ORDER VACATING THE ORDER PRO CONFESSO.

THE COURT'S ORDER VACATING THE ORDER PRO CONFESSO TAKEN AGAINST PALMER UNION OIL COMPANY, LEWIS A. HILBORN, AND PALMER OIL COMPANY, WAS CLEARLY ERROR, NO SHOWING WHATEVER HAVING BEEN MADE BY THESE DEFENDANTS FOR RELIEF.

The defendants Palmer Union Oil Company and Lewis A. Hilborn answered the original bill to the merits on October 28, 1913 (Trans. p. 93). They did not move to dismiss the original bill until November 8th following (Trans. p. 84). They thus having answered, it was imperative upon them, under New Equity Rule 32, upon the filing of the amended bill November 15, 1913, to file their answer within ten days, unless their time to *answer* should be extended by order of Court. No such order was obtained nor have they at any time answered the amended bill. Instead, upon November 25, 1913, they filed *motions* to dismiss (Trans. p. 94). These they

had a right to file, if they so chose, but to "*answer the amended bill within ten days*" was obligatory and imperative upon them, as the rule is unqualified.

New Equity Rule 32.

No showing was made whatever upon the motion by these defendants Palmer Union Oil Company and Lewis A. Hilborn. An independent, seemingly detached affidavit of merits by Gavin McNab was filed (Trans. p. 67). This, however, was insufficient for any purpose. By reason of these defendants having failed in compliance with the rule to file their answer within the required time, the order pro confesso was taken against them. Then they come forward with a motion to set aside the order pro confesso, and still they do not present their answer, although the law requires that in order to support their motion they must present the answer or a statement of defense upon merits. Plaintiff objects that defendants' showing is insufficient, but the Court vacates the order pro confesso without requiring an answer, so the defendants profit by disobeying the rule, for they never did file their answer.

In Schofield v. Horse Springs Cattle Co., 65 Fed. 433, the defendant's affidavit to open default was accompanied by a like affidavit of his counsel, neither of which contained a sufficiently definite statement of the proposed defense. The Court said:

> "While in some states there has been a practice which considers such advice of counsel, when the case has been fully stated to him, as

entitled to be considered by the Court in lieu of an affidavit stating the facts which show a defense to the complaint on the merits, I find that this has been a rule of practice which has been applied to law cases and not to cases in equity; that in equity, as a rule, such affidavits are not allowed, but an affidavit stating the facts constituting the defense, at least, must be presented."

The affidavits must show a meritorious defense.

To entitle a defendant to be relieved from an order or decree pro confesso, he must show a meritorious defense.

Ozark Land Co. v. Leonard, 24 Fed. 660.

It is even held that where a defendant seeks to set aside an order or decree pro confesso and litigate the case upon the merits, his proposed answer should be exhibited in connection with his application.

5 Enc. Pl. & Pr. 1024.

A decree will not be opened in order to allow the defendant to set up any defense except by answer.

5 Enc. Pl. & Pr. 1018.

Failure to answer amended bill gives right to a decree pro confesso to the whole amended bill, and not only to the amendment.

5 Enc. Pl. & Pr. 981, and notes.

A decree against several defendants opened on the application of one of them, stands in full force against the others.

5 Enc. Pl. & Pr. 1027, citing
Mansfield v. Hoagland, 46 Ill. 359.

THE AMENDED BILL STATES A VALID CAUSE OF ACTION IN EQUITY.

The principles upon which this suit is based in equity are most ably and succinctly summed up in

Kelly v. Fahrney, 145 Ill. App. 80,

from which we quote verbatim. The Court, by Mr. Justice Chrytaus, says:

> "That the officers and directors of a private corporation are in a fiduciary relation to the corporation and to the stockholders is elementary. Their duty under the principles of equity is to serve their trust beneficiaries honestly, faithfully, and without negligence. They may not avail themselves of their position for their own gain, profit, or advantage when to do so involves negligence of duty, loss of their service, or other loss, injury, detriment or disadvantage to the beneficiaries of their trust. It is fundamental in the law of corporations that the majority of the stockholders shall control the policy of the corporation and regulate and govern the lawful exercise of its powers and conduct of its business.
>
> "But as between one stockholder and another there is also a fiduciary relation and a duty to act honestly and in good faith, so far as the exercise of their powers *within the corporation* is concerned. In the common enterprise they may not form combinations among themselves to crush the pecuniarily weaker by the force of overwhelming financial power. Through the community of interest a relation has arisen and exists, affording opportunities of wrongdoing that otherwise could not exist. A majority combination may protect its own financial interests, but it may not exercise its powers for its own sole benefit at the expense of the minority nor designedly so conduct the corporation affairs

as immediately or ultimately pecuniarily to benefit some stockholders at the unequal, and, therefore, unfair and inequitable pecuniary loss on the part of others. Equity will not tolerate a majority combination in a joint financial undertaking to perpetrate a wrong and injustice upon the minority, when the combination is made possible merely by the nature of the relation. There is in such joint financial venture a limited fiduciary relation between the parties thereto.

"The principles above referred to have been announced frequently and under various circumstances. Citing cases:

"In Ervin v. Oregon Ry. & Nav. Co., 27 Fed. Rep. 625, 630, there was a controversy where a majority combination exercised its powers wholly according to the process of law, and yet a Court of Equity intervened to prevent injustice to the minority. Speaking of the majority who are defendants, the Court said:

" 'Plainly, the defendants have assumed to exercise a power belonging to the majority, in order to secure personal profit for themselves, without regard to the interest of the minority. They repudiate the suggestion of fraud, and plant themselves upon their right as a majority to control the corporate interests according to their discretion. They err if they suppose that a Court of Equity will tolerate a discretion which does not consult the interests of the minority.'

"And at page 631 the Court quotes Justice Blackburn, in Taylor v. Chichester Ry. Co., L. R. 2 Exch. 379:

" 'As the shareholders are, in substance, partners in a trading corporation, the management of which is entrusted to the body corporate, a trust is, by implication, created in favor of the shareholders that the corporation will manage the corporate affairs, and apply the

corporate funds, for the purpose of carrying out the original speculation.'

"And then continues:

"'When a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of legal control in exact proportion to their respective amount of stock. The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and cestui que trust. Peabody v. Flint, 6 Allen 52, 56; Hardy v. Metropolitan Land Co., L. R. 7 Ch. 427; Stevens v. Rutland R. Co., 29 Vt. 550. When several persons have a common interest in property, equity will not allow one to appropriate it exclusively to himself, or to impair its value to the others. Community of interest involves mutual obligation. Persons occupying this relation towards each other are under an obligation to make the property or fund productive of the most that can be obtained from it for all who are interested in it; and those who seek to make a profit out of it at the expense of those whose rights in it are the same as their own are unfaithful to the relation they have assumed, and are guilty, at least, of constructive fraud. Jackson v. Ludeling, 21 Wall. 616, 622; Story Eq., Sec. 323.'

"We concur in these expressions as being equitable principles controlling stockholders in the exercise of their powers, as such *within* the corporation."

Judged by these, or any other principles in equity, the amended bill unqualifiedly states a valid cause of action.

THE DEFENDANTS' MOTION TO DISMISS THE AMENDED BILL AND THE COURT'S ORDER AND DECREE THEREIN.

THE AMENDED BILL OF COMPLAINT IS IN ALL RESPECTS SUFFICIENT IN EQUITY AGAINST THE MOTION OF DEFENDANT PALMER UNION OIL COMPANY, AND OTHER DEFENDANTS, TO DISMISS THE SAME.

The arbitrary dismissal of the bill without leave to amend or without prejudice was based, as stated from the bench orally by the Court, upon the different divergent *prayers for relief,* and not upon the body or allegations of the bill, which the Court, in its filed opinion, held to state a cause of action.

These various objections to the prayers are found in paragraphs V, VIII, IX, X, XII of defendant Palmer Union Oil Company's motion to dismiss (Trans. p. 45).

The bill does not state two or more inconsistent statements of facts, and then ask relief in the alternative. It simply states the facts and asks relief according to the conclusion of law that the Court may draw from them, so that if one kind of relief sought be denied, another may be granted. The Court below became confused not by the allegations of the bill itself, but by the various added prayers for relief

which in no way, strictly speaking, constituted a part of the bill itself, and to which no motion could be directed; for if any part of the relief prayed for was proper, the defendant's motions must be overruled, as the relief granted could only be determined on final hearing.

Town of Strawberry Hill v. Chicago, M. & St. P. Ry. Co., 41 Fed. 568.

The pleading is not assailable merely by reference to its prayers for relief. The motion must be to the body of the bill.

Where the bill does not state facts rendering it multifarious, the prayer for relief cannot make it so.

De Neufville v. N. Y. & N. Ry. Co., 81 Fed. 10;

Jones v. Missouri Edison Electric Co., 144 Fed. 765.

A glance at the head notes of the last case covers every ground of objection referred to, completely refuting each.

Jones v. Missouri Edison Electric Co. is particularly interesting in that even the capitalizations of its corporations are the same as the case at bar, $10,000,000 and $2,000,000, respectively, the difference, however, being that in the citation the question was as to a consolidation, while in the case at bar the transfer between the two companies was an out and out *sale,* and not a consolidation, the selling company remaining intact as a corporate entity. The

appellants place themselves squarely upon the authority of this case.

The prayer is only a matter of form, and where a cause of action is stated, cannot be reached by demurrer.

Enc. Pl. & Pr., vol. XVI, p. 776 and p. 793, citing
Althof v. Conheim, 38 Cal. 230.

Where a party mistakes the form of his prayer for relief, and frames it inappropriately or inartificially, the Court may disregard trifling irregularities or mistakes, or treat the unnecessary request as surplusage, and grant such relief as will conform to the general form of the complaint, especially if it contains a general prayer for relief. Defects in the prayer of the character referred to will not be deemed jurisdictional.

Enc. Pl. & Pr., vol. XVI, p. 285;
Jones v. Van Doren, 130 U. S. 684.

As to the 7th prayer of the bill (Trans. p. 37), for a money judgment *for the benefit of the wronged corporation,* and which somewhat troubled the Court below, we simply call the Court's attention to no better or authoritative statement of the rule than the case of

Clews v. Jamieson, 182 U. S. 480,

where the Court says:

> "It often happens that the final relief to be obtained by the cestui que trust consists of the recovery of money. This remedy the Court of

> equity will always decree, when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust and a distribution of the trust monies among all the beneficiaries who are entitled to share therein."

The foregoing is quoted in a very able opinion by Mr. Justice Quarles, who sums up the law most admirably in

> Olmsted v. City of Superior, 155 Fed. 180, 181,

as follows:

> "Certain it is, however, that if a good, equitable cause of action has been stated in the bill, no error of judgment on the part of the pleader, either in giving undue prominence to a mere subordinate remedy or in framing a prayer which confuses legal distinctions, will prove fatal on demurrer. No such erroneous legal conclusions will conclude the Court or render the bill multifarious. (Citing De Neufville v. N. Y. Ry. Co., 81 Fed. 10; Brown v. Guarantee Trust Co., 128 U. S. 412; Lehigh Zinc & Iron Co. v. N. J. Z. & I. Co., 43 Fed. 548.)"

The foregoing dispose of paragraphs V, VIII, IX, X, XII of the motion of Palmer Union Oil Company to dismiss the amended bill, with which the motions of the other defendants are similar.

We will, however, briefly take up the remaining paragraphs of this motion, and in so doing it should be remarked that the foregoing were the grounds upon which the Court, by its memorandum opinion,

either denied or sustained the motion. Following, we advert to those grounds of the motion which the Court ignored in its opinion and so rejected. We, of course, have no exception to the Court's ruling on these, but since we understand this appeal would call before this Court all the grounds of defendants' motion, we now consider those features which the Court refused to notice.

Paragraph I (Trans. p. 43).

(a) That the amount in controversy does not exceed $3000.

It is elementary that the stockholder in such a suit as this, does not proceed *in his own right,* but on behalf of the corporation, which is the "essential party in interest". The corporation is the real *actor.*

In the case of Appleton v. American Malting Co., 65 New Jersey Eq. Repts. 377, 378, the true relation of a minority stockholder suit is thus explained:

> "The statement that a majority of the board of directors were, and are, among the persons against whom relief is sought by the bill, discloses a situation which relieved the complainants from the duty of applying to them to bring suit in the name of the corporation. It is settled that such application need not be made when the interest, or bias, of the directors, makes it certain that if it was made, it would be denied; or, if granted, that the litigation following would necessarily be under the direction of persons opposed to its success.

> "The complainants do not bring the suit to establish a right of their own, or because they are personally entitled to the relief sought. They are permitted to sue *ex necessitate rei,* because the interests of those in control of the corporation are hostile to those of the corporation itself. Although, on the record, the corporation is a party defendant, yet, in reality, the complainant represents it. Except in name, the suit is an action brought by the corporation; it is maintained solely for its benefit, and the final relief, when obtained, belongs to it and not to the complainant."

Such averments are fully set forth in Paragraph XV of the amended bill (Trans. p. 34).

The amount in controversy, being the total value of the assets transferred and sought to be recovered from the defendants, is $2,500,000 (Bill, par. I, Trans. p. 5).

> "The sum or value of the matter in dispute which conditions the jurisdiction of a Federal Circuit Court is the amount or value of that which the complainant claims to recover or the amount or value of that which the defendant will lose if the complainant obtains the recovery he seeks."
>
> Cowell v. City Water Supply Co., 121 Fed. 53.

In stockholder's bills it is the amount of threatened loss by corporation, or value of assets, etc., "not the value of the plaintiff's stock", which determines jurisdiction.

> 1 Fost. Fed. Pr., 5 Ed., sec. 16, p. 42.

"The bill alleges that this suit is brought by the complainants in behalf of themselves and all other owners of landholders' shares who are similarly situated, seeking, among other things, to protect the interest of the lands of the defendant corporation as against a proposed sale of such lands. 'Where a suit is brought by one or more for themselves, and all others of a class jointly interested for the relief of the whole class, the aggregate interest of the whole class constitutes the matter in dispute.' (Citing Fost. Fed. Pr., 4 Ed., Sec. 16 K, page 107, and cases cited.)"

Haywood v. McDonald, 192 Fed. 892.

Also,

Carpenter v. Knollwood, 198 Fed. 298.

(b) That the suit is of a local nature, being brought in the wrong district.

(This point was not raised by defendant's counsel upon the oral argument, and may, therefore, be deemed abandoned.)

Appellants, however, call the Court's attention to the fact that this is a suit *in personam* to compel the reconveyance of real and personal property and assets; in other words, it is an action founded upon a trust relation (the majority as trustees for the minority) as to real and personal property and assets (cash on hand and in bank, bills receivable, contracts for the delivery of oil, oil in storage, etc.), and in the nature of conversion, and is plainly, therefore, transitory and not local, affording purely a personal remedy. It was brought in the Northern

District of California where nearly all the defendants resided, and where the Palmer Union Oil Company could be sued jointly with the others.

The Court having jurisdiction of the parties, and the action being in equity, it is of no consequence where the land lies, the Court acts in personam.

> Memphis Savings Bank v. Houchens, 115 Fed. 96.

> "A decree to convey land lying in another state does not affect the title; it only operates upon the person who is to make the conveyance, and it is his act in making the deed that affects the title."
>
> Smith v. Davis, 90 Cal. 25; cited with approval in
>
> Peninsular etc. Co. v. Pacific S. W. Co., 123 Cal. 689.

The objection to jurisdiction raised by the defendant Palmer Union Oil Company (and by all the defendants except the trust company) in these motions to dismiss the amended bill is that:

> "The Court has no jurisdiction of the *subject matter* of the action."

Neither in the return of Palmer Union Oil Company to the temporary restraining order, October 11, 1913, nor in the answers of Palmer Union Oil Company and Lewis A. Hilborn to the original bill upon the merits, October 28, 1913; nor in these motions to dismiss the amended bill, have these

defendants, or each or any of them, raised a question of the jurisdiction of the Court over the *person.*

The question of venue is a personal privilege, and must be raised at the very first opportunity, or it is waived.

Trust Co. v. McGeorge, 131 U. S. 132;
Improvement Co. v. Gibney, 160 U. S. 217.

"If the citizenship of the parties is sufficient a defendant may consent to be sued anywhere he pleases and certainly jurisdiction will not be ousted because he has consented."

Ex parte Schollenberger, 96 U. S. 369.

"No case has been cited, however, when any Federal Court has dismissed an action on the sole ground that it was brought in the wrong district, after the defendant had appeared generally, or pleaded to the merits without first objecting that the action was not brought in the district of the residence of either of the parties to the action. This objection relates not to the jurisdiction of the Court but to the personal privileges or exemption of the defendant."

Souther Exp. Co. v. Todd, 56 Fed. 106.

Resident defendants cannot object that their co-defendant is sued out of his district.

"Where several defendants, who might be sued either separately or together, are joined in one suit, brought in the circuit court, in a district in which only a part of them are residents, the jurisdiction of the circuit court depending only on diverse citizenship, the defendants who reside only in the district where suit is brought cannot move to dismiss, on the ground of want of jurisdiction, under the act of congress

> of August 13, 1888, and the non-resident defendants can only move to dismiss as to themselves, not as to the whole proceeding."
>
> Smith v. Atchison, T. & S. F. R. Co. et al., 64 Fed. 1.

Hence none of these defendants could raise the objection that their co-defendant, Palmer Union Oil Company, was not sued in the Southern District,—and the Palmer Union Oil Company itself waived it by answering to the merits.

Paragraph II (Trans. p. 44).

That there is a nonjoinder of parties defendant because Palmer Senior Oil Company has not been joined as a party.

Aside from the fact that the Palmer Senior Oil Company is defunct and out of existence, having been disincorporated some years ago by these very defendants now raising the point, a fact, however, that is not revealed by the pleadings, we hardly see, even from the pleading how it is a necessary party.

The Palmer Senior sold to the Union the *option* to purchase from the trust company the lands, and for this option it was paid by the Union stock. This made the Senior a mere stockholder in the Union. It had no further relation in any way to the option or to the lands. The Senior was no more entitled to be made a party to this suit than would have been any other stockholder of the Union, and had it been so made a party, it would have been incorrectly made and its name must have been

stricken from the pleadings. If it were in existence it would simply, so far as this cause is concerned, be treated the same as any other stockholder of Palmer Union Oil Company, and if it were joined each other individual stockholder of the Union would have to be joined likewise. The Court in this instance evidently became confused by the *prayer* of the bill, and treated it, rather than the body of the bill itself, as controlling. Even, however, on this theory, the prayer itself (par. V, Trans. p. 36) does not affect the Palmer Senior Oil Company, but only the Palmer Union bonds, the trustee for which, Anglo-California Trust Company, is a party to the action.

The individual bondholders of Palmer Union can hardly be said to be necessary parties while the trustee of their bonds is before the Court and submitting to its jurisdiction.

Moreover, the Palmer Senior Oil Company could have been brought in any time as a party by the Court's own motion, and the Court could, therefore hardly be said to be warranted in arbitrarily dismissing so serious a bill upon so slight a technicality.

In the second clause of the Court's memorandum opinion dismissing the bill the Court says, *"the bondholders of Palmer Union are necessary parties"*. This was a finding of the Court's own motion. The absence of these bondholders as parties was not pointed out by defendant nor made a ground for objection to the bill. The Court then holds (clause

8) *"That by reason of the non-joinder of necessary parties"* etc., *"the bill should be dismissed"*. Here we have the Court raising of its own motion an objection to the bill respecting parties and dismissing the bill without leave to amend, denying the right to amend when asked, because there were not made parties those whom the defendants themselves did not oppose the bill because not so made! Obviously this was beyond the power of the Court. The Court can of its own motion require other parties to be brought in, but it cannot dismiss the bill without leave to amend, because of its own motion it finds parties not in the bill who should be in, and who can be brought in if the plaintiff be permitted to do so. It is certainly not the law that a failure to make a party to a bill in a lengthy and involved array of facts, some person whose presence was not thought necessary by either side, but whom search and analysis of the bill by the Court discloses should have been brought in, is a fatal and incurable defect and the bill cannot be amended by adding such name; yet this is the gist of the Court's ruling:

> "A failure to make other parties owners of the chose in action parties to such a suit is a curable defect, and it will not sustain a judgment of dismissal of the bill on its merits. The bill should be retained until the complainants have reasonable opportunity to amend it and to bring in such part owners or to show in their amended bill an excuse for their ab-

sence, under the practice in equity in the Federal Courts."

Rogers et al. v. Penobscot Mining Co. et al., 154 Fed. 606.

Paragraph III (Trans. p. 44).

It is further urged that the creditors of Palmer Oil Company are necessary parties, and have not been joined. (This ground was denied by the Court.)

It nowhere appears in the pleading that there are any creditors. If such should be found upon the trial they could be brought in by the Court. Moreover the claim of these defendants is that the Palmer Oil Company has been successfully put out of existence by their own acts, and is now defunct.

Paragraph IV (Trans. p. 44).

The extreme technicality raised in the objection that the bill does not contain the usual caption is hardly worthy of notice as ground for dismissal of bill of so serious import. The original bill contains the proper caption of a full statement of parties plaintiff and defendant and its omission in the amended bill was an omission easily corrected.

Paragraph V (Trans. p. 44).

Raising the objection that the bill does not contain a short statement of the grounds upon which the Court's jurisdiction depends is best answered by the bill itself in its opening paragraph fully setting forth the diversity of the citizenship of the

parties. This the Court in its opinion held sufficient.

Paragraph VI (Trans. p. 44).

Raising the objection that the bill does not contain a short statement of the ultimate facts upon which the complainant asks relief is best answered by the character of the bill itself which of necessity must set forth the various steps by which the frauds complained of were accomplished. This the Court, in its opinion, held sufficient.

Paragraph VII (Trans. p. 44).

Raising the objection that the bill does not state why the creditors of Palmer Oil Company are not made parties is answered simply by the fact that it nowhere appears either by the bill itself or elsewhere that there are or ever have been any creditors of Palmer Oil Company; but in fact it appears that the defendants raising this objection claim that by their own acts the Palmer Oil Company has been disincorporated and no longer exists.

Paragraph XI (Trans. p. 45).

That the facts set forth do not constitute a cause of action in equity.

Aside from the fact we have fully covered this in the opening part of the argument, we recall the Court's attention to the very minute and definite character of the facts themselves set forth in the bill. If there ever was a bill gripping with facts constituting a cause of action, this is one.

Paragraph XIII (Trans. p. 45).

That the bill fails to comply with Equity Rule 38.

The bill itself is the best answer (Trans. p. 3, middle paragraph).

> "Your orator further shows that the questions involved, and the relief demanded in this suit, are of common and general interest to many persons, to wit, to all the stockholders of said Palmer Company, constituting a class so numerous as to make it impracticable to bring them all before the Court in this suit." (Trans. p. 3.)

Paragraph XIV (Trans. p. 46).

That the bill does not allege complainant to have been a stockholder at the time of the transaction complained of.

To this again the bill itself is the best answer (Trans. p. 2, first 8 lines; Trans. p. 33, par. XV).

> "Your orator, Andrew Clauss, is a resident and citizen of the State of Ohio, and on the 1st day of October, 1911, was the owner and holder of one thousand shares of the capital stock of the defendant Palmer Oil Company, and at all times since said date has been and now is the owner and holder of said one thousand shares of said stock." (Trans. p. 2.)
>
> "That your orator was and has been and now is the owner and holder of said one thousand shares of the capital stock of said Palmer Oil Company at all times herein mentioned since prior to said 21st day of October, 1911; and your orator did not consent to the transfer of said assets of said Palmer Company to said

> Union Company, and did not at any time consent to, and had no knowledge of the transfer by said defendant directors of said Union Company bonds belonging to said Palmer Company to said Union Company in exchange for the preferred shares of said Union Company, and did not deliver up his said Palmer Company stock to said Union Company in exchange for said preferred and common stock of said Union Company." (Trans. p. 33.)

The amended bill of complaint is in all respects sufficient in equity against the motion of defendant Palmer Union Oil Company to dismiss the same.

In the separate motions of individual defendants other than Palmer Union Oil Company there is set up the additional ground of an alleged improper joinder of parties defendant.

This objection is raised by paragraphs I, II, III, motions of individual defendants, excepting Palmer Union Oil Company and Palmer Oil Company (Trans. pp. 52, 53).

In this connection we refer the Court to the leading case of

Brown v. Deposit Co., 128 U. S. 412,

where the Court says:

> "The case against one defendant may be so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party to some portion only of the case stated. * * * It is not indispensable that all the parties shall have an

interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others."

In

Sheldon v. Packet Co., 8 Fed. 769, 770,

Mr. Justice Harlan said:

"As a general rule, the Court will not compel parties to incur the expense, vexation, and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. A different rule would often prove to be both oppressive and mischievous, and could result in no possible benefit to any litigant whose object was not simply to harass his adversary."

Later in the opinion Justice Harlan approvingly quotes from the opinion of Chancellor Kent in Brinkerhoff v. Brown, 6 Johns. Ch. 139, the following:

"It thus appears from the bill that all the defendants were not jointly concerned in every injurious act charged. There was a series of acts on the part of the persons concerned in the company, all produced by the same fraudulent intent, and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama, but it was still one piece, the entire performance, marked by different scenes; and the question now occurs whether the several matters charged are so distinct and unconnected as to

> render the joining of them in one bill a ground for demurrer. The principle is that a bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct."

Unless the Court can see that hardship and injustice have resulted from the joinder of parties, a decree should not be reversed upon this ground.

Oliver v. Piatt, 44 U. S., 3 How. 333.

Applying these clearly stated principles to the pending bill, it will be seen that the amended bill is directed primarily against the sale under the contention that such sale was fraudulent and voidable. In so doing it was necessary to make recital of the various steps leading up to such sale; but all relate to the desired setting aside of the sale, and are a part of the matters in which the said sale and transfer of assets are alleged to be fraudulent and voidable by the minority shares on behalf of the corporation. In this view the charges of fraud on the part of the various defendants are not antagonistic so that all may not stand together in one bill. The same parties must be defendants therein if separate suits were instituted to avoid the sale. If convenience is to be a largely controlling test, then the convenience of the parties is served, without injury to them, by having these

matters litigated in the same suit. So also as to the matters recited which occurred after the sale. Their alleged invalidity is based on the alleged invalidity of the sale, and the parties necessary to the bill attacking the sale are so interested in the attacks on those subsequent matters as that they are not improperly made defendants as to the latter attacks. We see no good reason for the assumption that these parties are improperly joined in a suit which thus attacks the sale upon which their rights are so largely based. In other words, though all of the parties to this suit do not have the same interest in every material feature of the suit, yet each "has an interest in some material matters in the suit, and they are all connected with the others". The main recitals of the bill relate to and affect the alleged invalidity of the sale, or are dependent thereon. There is little, if any, of the evidence which may be introduced to prove the allegations of the bill, as to the invalidity of the sale and the grounds thereof, which will not concern and affect the rights of each of the parties made defendants herein. Around the alleged invalidity of the sale are grouped the rights and interests of all the parties.

The joinder in a suit by a minority stockholder to avoid a consolidation, of the majority stockholders and the directors who took an active part in creating the consolidation, does not render a bill multifarious. A bill is not multifarious which presents a common point of litigation, the decision

of which will affect the whole subject matter and settle the rights of all the parties to the suit.

Jones v. Missouri-Edison Electric Co., 144 Fed. 767.

THE COURT ERRED IN ITS ARBITRARY REFUSAL TO ALLOW COMPLAINANT TO AMEND HIS BILL TO CONFORM TO THE COURT'S FILED OPINION, AND THE ENTRY OF ITS ORDER DENYING COMPLAINANT'S MOTION TO THAT EFFECT.

The Court's arbitrary refusal to allow complainant leave to amend his bill to conform to the Court's opinion filed upon the motions dismissing the bill, was error and an abuse of discretion.

The Court's opinion filed in denying such motion was erroneous in holding that the citizenship of several intervenors being of the same state as that of the defendants ousted the jurisdiction of the Court after it had already assumed jurisdiction in the main suit (Trans. p. 80).

> "Consolidations and interventions do not oust the jurisdiction of the Court in the main suit, whatever the citizenship of the parties thus brought into it may be."
>
> Sioux City v. Trust Co., 82 Fed. 128.

> "The rule is that consolidations, cross bills and interventions do not oust jurisdiction."
>
> Lilienthal v. McCormick, 117 Fed. 96;
>
> Ames v. Big Indian etc., 146 Fed. 181.

"Having jurisdiction of the parties and the cause, residence of intervenors is immaterial."

Clarke v. Eureka etc., 116 Fed. 534;

Everett v. School District, 102 Fed. 529.

THE REFUSAL OF LEAVE TO AMEND WAS AN ABUSE OF DISCRETION.

The Court in Hardin v. Boyd, 113 U. S. 758, says:

> "If the bill is found defective in its prayer for relief, or in proper parties, or in the omission or statement of fact or circumstance connected with the substance of the case, but not forming the substance itself, the amendment is usually granted. * * * The amendment offered here did not introduce new allegations, nor make additional parties, nor encumber the record, nor increase the expenses of the litigation, nor complicate the suit, nor make new issues of fact. It simply enabled the Court, upon the case made by the original bill, to give the relief which that case justified." (Citing many cases.)

The Court below in its opinion held that the amended bill stated a valid cause of action in equity. It was confused, however, by the various prayers for relief. The complainant asked leave to amend by dismissing these prayers which confused the Court and to leave the prayer of the bill one simply to set aside the wrongful transfer of assets on

the ground of fraud. There was no question but that the bill stated a good cause of action as to this.

In

People v. Mount Shasta Co., 107 Cal. 256-258,

the Court says:

> "The Court refused to allow the plaintiff to amend the complaint. This is generally a matter of absolute right, and when it is refused the Court must be able to see that the complaint cannot be so amended or to state a good cause of action. *This the Court will not often be able to do.*"

It would be a strange, harsh rule to deny a party leave to amend and to litigate his just demands after a decision, as in our case on a point in pleading.

As the Court says in

Guidery v. Green, 95 Cal. 630:

> "It can rarely happen that a Court would be justified in refusing a party leave to amend his pleadings, so that he may properly present his case."

Great liberality should be shown by a trial Court in permitting, when it can be done without working great delay, such amendments to pleadings as facilitate the production of all the facts bearing upon the questions involved in the action; and to strike out a pleading, under such conditions, is a

harsh proceeding, and should only be resorted to in extreme cases.

Burns v. Scoofy, 98 Cal. 272.

"When it was discovered that the pleadings were defective, the Court should have afforded an opportunity to amend. Such was the only way in which the real subject of dispute could be reached, tried and finally determined."

Stringer v. Davis, 30 Cal. 322.

The foregoing decisions of the California Supreme Court are made authority in the U. S. District Court, by Rule 18 of the "Rules of Practice of the U. S. Circuit Court for the Ninth Circuit, Northern District of California", and are respectfully submitted with this rule as to amendments to pleadings in mind.

"Grounds were stated in the demurrer which would, if sustained, be a bar to any other suit. It does not appear by the decree, or by the order sustaining the demurrer, on which of the grounds set out in the latter, it was sustained, or on what ground the bill was dismissed. As the record stands the decree might be pleaded successfully as a bar to any other bill, and to prevent what may be a great injustice, we must reverse the present decree, and remand the case, with directions to allow plaintiffs to amend their bill as they may be advised."

House v. Mullen, 89 U. S. 42-47.

"The decree standing as it does is a decision on the merits of the case and a bar to any other suit. It should therefore be reversed."

Goodman v. Niblack, 102 U. S. 563.

THE DECREE OF THE DISTRICT COURT SHOULD BE REVERSED WITH DIRECTIONS TO DENY THE MOTIONS OF DEFENDANTS TO DISMISS THE AMENDED BILL.

It is respectfully submitted this cause should be remanded to the trial Court with directions for further proceedings to be there taken, as follows:

I. To set aside its order of January 26, 1914, vacating the order pro confesso taken against Palmer Union Oil Company, Lewis A. Hilborn and Palmer Oil Company.

II. To vacate and set aside its order granting the motions of defendants to dismiss the amended bill of complaint in the order of March 2, 1914, dismissing the suit.

III. To vacate and set aside the final decree of March 4, 1914, dismissing the amended bill.

IV. To thereupon enter its order denying the various motions of said defendants to dismiss the amended bill, thereby finding the amended bill good and sufficient, with instructions to at once, upon the payment of costs to the complainant, file their answers to the amended bill.

V. If this Court shall rule against the appellants upon the foregoing, then to remand this suit to the trial Court with instructions to said Court to permit the complainant to amend his bill as he may be advised within a reasonable time, and to amend to that effect, its said order of April 3, 1914.

Dated, San Francisco,
October 31, 1914.

JOHN E. BENNETT,
JESSE OLNEY,
Solicitors and Counsel for Appellants.